DONALD FRANCIS MINAKER (PLAINTIFF) ..... } APPELLANT;

AND

LENA VIOLET MINAKER (DEFENDANT) ..... } RESPONDENT.

1948 *Nov. 30

1949 *Jan. 7

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Husband and wife—Legal proceedings—Action by husband to recover land from wife, founded in tort, and barred by the Married Women's Property Act, R.S.O. 1939, c. 209, s. 7.

Following the grant of a decree *nisi* at the suit of a wife, the husband brought action against her, claiming possession and mesne profits of the house and premises occupied by the wife and their infant son, which the husband had left on ceasing to cohabit with his wife. He further claimed an order for the delivery to him of the furniture and chattels on the premises, and damages for injuries done the premises, furniture and chattels. The wife by counterclaim sought a declaration that she was the owner of all the property, or in the alternative, that all the property was held by the husband in trust for her either wholly or to the extent of a one-half interest.

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Locke JJ.

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The Court, treating the matter as if proceedings had been taken under s. 12 of the *Married Women's Property Act*, R.S.O., 1937, c. 209.

Held: that the real property was that of the husband and gave him judgment for possession, but held further that even under that section, the husband was not entitled to mesne profits, as that is a claim for a tort barred by s. 7.

Per Rand and Kellock JJ.:—The proceeding for wrongful detention of the possession of land is the modern equivalent of the old action for ejectment, and therefore such an action in tort as is barred by s. 7 of the Act.

The majority of the Court expressed no opinion on this point.

The trial judge having decided that the wife was entitled to one half the furniture, and there being no appeal from that decision, it was affirmed.

APPEAL from an Order of the Court of Appeal for Ontario, dismissing an appeal from the judgment of Gale, J., after the trial of the action without a jury, wherein the learned trial judge dismissed the action of the appellant for possession of the premises, and for an accounting, and for delivery up of certain chattels and funds, and found that the defendant was entitled to a one-half interest in the house and premises, and in the goods and furniture upon the premises.

R. F. Wilson, K.C. for the appellant.

A. W. S. Greer K.C. and C. L. Dubin for the respondent.

The judgment of Kerwin, Taschereau and Locke, JJ. was delivered by:—

KERWIN J.:—The parties to this dispute had been husband and wife but, at the suit of the wife, a decree *nisi* was granted by the Supreme Court of Ontario on November 1, 1946, dissolving the marriage, which decree was not made absolute until May 27, 1948. In the meantime, and immediately after the decree *nisi*, the husband demanded possession of the house and premises at 267 College Street, Kingston, in which the parties and their young son had lived and issued the writ in this action on July 4, 1946, claiming possession and mesne profits, an order for the delivery to him of the furniture on the premises and his personal belongings and chattels, and damages for injuries done the premises and furniture and chattels. This was

done instead of proceeding by way of motion as provided by section 12 of *The Married Women's Property Act,* R.S.O. 1937, chapter 209. The wife counter-claimed that she was the owner of the College Street premises, or in the alternative that the husband held them as trustee for her, or in the further alternative that the two were jointly entitled. The trial judge dismissed the action and declared that each party was entitled to a one-half interest in the College Street property and in the goods and furniture. The husband was ordered to pay the costs of the action and there were no costs of the counter-claim. On appeal this order was affirmed.

The litigation has already put the parties to considerable expense and we deem it advisable to treat the matter as if proceedings under section 12 of the *Married Women's Property Act* had been taken. So dealing with the matter, it is impossible to reject the husband's claim that the property is his. We can find no evidence to substantiate the finding of the trial judge that there was an arrangement between the parties, well understood if not expressed, that they should mutually share in what they accumulated. No moneys earned by the wife in any way were advanced to the husband to purchase the earlier residences of the married couple, which, from time to time, were sold until the College Street property was purchased, nor were such moneys loaned by her to the husband. The law is quite clear that under these circumstances the land is the husband's. *Rioux* v. *Rioux* (1), is an example although what was dealt with there was money in a bank account. But while the husband is entitled to judgment for possession, he is not entitled to mesne profits. That is a claim for a tort, which is prohibited by the concluding part of section 7 of the *Married Women's Property Act.*

The furniture stands in a different position. At the trial, the entire record in the divorce proceedings was put in as evidence by the plaintiff and it appears in that record that the wife had testified that the furniture belonged to her. In addition, her mother testified at the trial of this action that the husband had told her that when he sold certain furniture belonging to the wife, there was enough money

(1) (1922) 53 O.L.R. 152.

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to purchase the new. The trial judge decided that the wife was entitled to one-half of the furniture and as there was no cross-appeal from that decision, it must stand.

While a question was raised as to the right of a husband to secure an order or judgment for possession of the matrimonial domicile, the point as to whether an action lies at the suit of a husband to recover judgment for possession *simpliciter* of real property was not argued and I express no opinion upon the subject since, in my view, it is unnecessary to do so. I would therefore set aside the judgments below and direct that there should be judgment for possession by the husband of the College Street property. Clause 3 of the formal judgment at the trial as to the goods and furniture stands with a variation that if the parties cannot agree as to their division, the matter will be referred to the local Master of the Supreme Court of Ontario at Kingston. The respondent is entitled to one-half of her costs of the counter-claim in the trial Court and one-half of her costs in the Court of Appeal and in this Court but no further order as to costs is made.

RAND J.:—This action was brought by a husband against his wife to recover land, including a house in which the wife and child were at the time living, as well as furniture and other chattels. In December, 1945, the husband had withdrawn from cohabitation and some time later the wife instituted proceedings for divorce. In that action an order *nisi* after trial was directed on June 5, 1946, by which provision was made for alimony; but as the decree is not before us it is impossible to say just what its terms are. On July 4, 1946 the writ in this action was issued and the order *nisi* was made absolute after the appeal to this Court had been brought.

In addition to possession of the land, the plaintiff claimed an accounting of rents and profits, the delivery of the chattels, and damages to both the real and personal property. The wife by counterclaim sought a declaration that all the property was held by the husband in trust for her either wholly or to the extent of a one-half interest.

The proceeding is clearly one in the nature of ejectment with mesne profits, and detinue, with damages for trespass. By section 7 of the *Married Women's Property Act* of Ontario all actions of tort between husband and wife,

except those necessary for the protection and security of the wife's separate property, are barred, and the initial question is whether or not the case is within that prohibition. That it is would seem to be reasonably clear. It alleges a wrongful detention of the possession of both land and chattels and mesne profits are damages in trespass. In *Salmond's Law of Torts* 5th Ed., p. 208, in the *Digest of English Civil Law* under the editorship of Edward Jenks 3rd Ed., p. 365 and in *Pollock on Torts* 14th Ed., at pp. 7, 271-7, such a claim is treated as in tort. Ejectment was a special form of trespass based upon a wrongful dispossession, and in a note on page 127, Salmond says:—

> The plaintiff in such cases recovers not only the land itself, but also damages for the loss suffered by him during the period of his dispossession (mesne profits), and it is by virtue of this right to damages that the wrongful dispossession of land is correctly classed as a tort.

Originally the relief in trespass *de ejectione firmae* was damages only. Gradually there was added to it the recovery of the land by the dispossessed tenant; and ultimately it became the mode by which conflicting claims to title, as well as possession, were adjudicated. Gradually also the claim for substantial damages or mesne profits beyond the nominal damages in the main action came to be severed from the ejectment; and on judgment for the latter, the courts treated the unlawful possession as a continuing trespass for which an action lay. Under the *Judicature Act* an action for recovery of land on any footing can include a claim for those profits.

A slight elaboration of the elements of the action of ejectment seems to me to put the question beyond doubt. As this proceeding finally developed, from considerations leading to the recovery of the land by a termor as well as the applicability of the action to a freeholder, it was grounded in a fictitious expulsion of a fictitious lessee and it was this lessee who brought the action against the fictitious trespasser. The actual occupant was not allowed to defend unless he admitted the lease and the ouster, and having done that he was allowed to set up any title under which he might claim. But trespass was the foundation and the judgment established a trespass from the time of the wrongful detention of possession on which the claim for damages for mesne profits was based.

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The essential fact is that the action is conceived to be grounded on wrongful detention as a delict or tort; and the question is whether the text of section 7, considering the purpose of the statute as affecting primarily property of the wife and incidentally the relation of husband and wife, is not to be construed as being intended to protect the conjugal association to the extent of maintaining the ban on resort to the ordinary processes of litigation where that arises upon a fault or a wrong. At common law no action lay between husband and wife both because of a formal obstacle, i.e. that the wife could be impleaded only with the husband; and one of substance, that they were held to be one person between whom none of the ordinary rights or claims in law could arise. The Act contains no express provision enabling the husband to bring any action against the wife; that right, uniformly accepted to exist, arises only as an inference from the statute; and in defining the limitations of an exception from that inference, we should, I think, do so in the light of the considerations mentioned.

Section 12 of the Act, under which the judge to whom the application is made, may make such order "as he sees fit", seems designed to meet just such a controversy over possession, and this proceeding can be converted into an application under that section: *Bashall* v. *Bashall* (1), cited in *Lush on Husband and Wife,* 4th Ed., p. 601, in which it was held that the counterclaim for detinue by the husband was within the same ban of the statute.

The judgment declared the wife to be entitled to a one-half interest in both the land and personal property, and it was affirmed unanimously on appeal. The facts tend, no doubt, to excite sympathy for the wife and child, but we must resist the danger of allowing it to outrun rules too well and too long established to be disregarded. Viewing the evidence in the light most favourable to the wife, I can find nothing to warrant the holding either that there was a contract between them by which any interest in the property was to be hers, or that any money belonging to her can be said to be represented by the land. In the early period of their married life the wife accepted the difficulties of the situation courageously and for three or four years worked in outside employment at wages; but they went

(1) The Times, 21st Nov. 1894.

into the common fund used to carry the family life from day to day. It is, I think, impossible to trace any part of the money so earned into the purchase of the land or into the two properties whose purchase and sale preceded it. For those reasons the judgment in this respect cannot stand.

The personal property, however, is in a different position. Admittedly a substantial portion of the original furniture was the wife's, much of which came from her parents' home. A great deal of it was sold and new bought and there is evidence of an admission by the husband that most of what is now in the house was paid for with the proceeds of that sold. The judgment in this respect, therefore, should be affirmed.

Although it is agreed by all members of the Court that the claim for mesne profits is a claim in tort, it is not unanimous that the claim for possession is clearly so. A number of questions are raised by that distinction, among them, the possibility of treating these claims as severable in the sense required; but in the circumstances of the case and notwithstanding my own view, I see no objection to assuming, without deciding, that the action, limited to the claim for possession, lies; in the circumstances, this basis of disposal does not change the result to which I would come by treating the proceedings as brought under section 12 of the statute.

The appeal must therefore be allowed as to the land and the appellant will be entitled to an order for possession. If the parties cannot agree upon a division of the personal property there should be a reference to the Master for the necessary action. The respondent will be entitled to one-half the costs of the counterclaim in the trial court and one-half of her costs in both the Court of Appeal and this Court; there will be no other costs.

KELLOCK J.:—On the hearing of this appeal the question was raised from the bench as to the appellant's right to bring action against the respondent for possession of the matrimonial home and furniture, as well as for mesne profits, even although the action had been commenced after the decree *nisi* in divorce proceedings brought by the respondent against the appellant but before decree absolute.

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The statement of claim alleges ownership in the appellant and (*a*) as to the real property claims possession, an accounting of rents and profits during the time the respondent "unlawfully" retained possession and damages to the premises; and (*b*) as to the chattels, an order for delivery and damages for injury thereto. There is no evidence of any injury to land or goods.

Under the provisions of section 7 of the *Married Women's Property Act,* R.S.O., 1937, cap. 209, a married woman is given in her own name against her husband, the same remedies for the protection and security of her separate property as if such property belonged to her as a *feme sole,* but, "except as aforesaid no husband or wife shall be entitled to sue the other for a tort". By section 12, subsection 1, it is provided that, in any question between husband and wife as to the title to or possession of property, either party may apply in a summary way and the judge "may make such order with respect to the property in dispute and as to the costs of and consequent on the application as he thinks fit or may direct * * * any inquiry or issue touching the matters in question to be made or tried in such manner as he shall think fit".

The present action is, with respect to the real property, an action to exclude the respondent from the matrimonial home on the ground that she "wrongfully" retains possession, i.e., that she is a trespasser.

In order to determine whether or not this action is one barred by the provisions of section 7 it is necessary to have regard to the old forms of action. As stated by Salmond in the 10th Edition, page 3:

> * * * all satisfactory definition and classification of the different species of such injuries (civil injuries) must be based on the old procedural distinctions between forms of action, and must conform to those distinctions except in so far as they no longer have any relation to the substantive law of the present day.

What the appellant seeks in this action is that which would formerly have been sought in the action for ejectment and for mesne profits.

In *Adams on Ejectment* the author says at page 334:

> * * * the action for use and occupation is founded on *contract,* the action of ejectment upon *wrong,* and they are therefore wholly inconsistent with each other when applied to the same period of time; since in the one action the plaintiff treats the defendant as a *tenant,* and in the other as a *trespasser.*

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And at page 333:

On the first introduction of the action of ejectment, and whilst the ancient practice prevailed, the measure of the damages were the profits of the land accruing during the *tortious* holding of the defendant; but when the proceedings became fictitious, and the plaintiff nominal, the damages assessed became nominal also; and no provisions have since been made by the Courts, either by engrafting additional conditions upon the consent rule, or by the invention of new fictions, to enable the jury in the action of ejectment to inquire into the actual damages, and include in their verdict the real injury sustained by the wrongful holding. The party has not, however, been left without redress . . . The Courts have sanctioned an application of the common action of trespass *vi et armis* to the purposes of this remedy. It is generally termed *an action for mesne profits* * * *

In *Bramwell* v. *Bramwell* (1), Goddard L.J., as he then was, said at 373:

An action for the recovery of land is the modern equivalent of the old action of ejectment. That action was a personal action and could only sound in damages. Then in favour of this class of remedy the courts determined that the plaintiff was entitled to recover as collateral and additional relief possession of the land itself (see *Stephen on Pleading*, 3rd ed. p. 12), but it was in fact always a species of the action of trespass. It is not necessary to decide it in this case, but I have the greatest doubt whether a husband can bring an action for the recovery of land against his wife, alleging that she is wrongly in occupation of it, because, if she is wrongly in occupation of the land and he has a right to the possession of it, it seems to me she is a trespasser and therefore he is suing her for a tort.

Salmond at 214 says:

The wrong of dispossession consists in the act of depriving any person entitled thereto of the possession of land. This deprivation of possession may happen in two ways—namely, either by wrongfully *taking* possession of the land, or by wrongfully *detaining* the possession of it after the expiration of a lawful right of possession. In the first case, the wrong of dispossession is also a trespass; in the latter it is not. But so far as regards the essential nature of the wrong and the remedies available for it, there is no difference between one form of dispossession and the other.

Any person wrongfully dispossessed of land may sue for the specific restitution of it in an action of ejectment.

And at page 217:

The action for mesne profits was a particular form of the action of trespass *quare clausum fregit*; * * * Whether the dispossession had or had not been effected by way of trespass, the claim for mesne profits was always in form a claim for damages for a continuing trespass upon the land.

In my opinion the claim with respect to the real property is an action in tort and barred by the provisions of section 7. The sole remedy of the appellant therefore was under that

(1) [1942] 1 K.B. 370.

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section, and in my opinion the course of the decisions uniformly recognizes this situation; *Re M. and M.* (1); *Gardner* v. *Gardner* (2); *D. and D.* (3); Under the section however, there is no jurisdiction to award mesne profits; *Larner* v. *Larner* (4).

Similarly, with respect to the chattels, "if a wife wrongfully converts to her own use the goods of her husband the only remedy of the husband, so far as he has any remedy at all, is to apply to the court under the special provisions of the *Married Women's Property Act*"; per McCardie J. in *Gottliffe* v. *Edelston* (5) at 382. The decision of the Court of Appeal in *Curtis* v. *Wilson* (6), overruling *Gottliffe* v. *Edelston* does not affect the correctness of the view of McCardie J. in the excerpt quoted.

In his lectures on *Forms of Action of Common Law* Maitland says at page 76:

> We have no longer to classify the forms for they are gone; but I think we still are obliged to say that every action for a chattel is founded on tort if it be not founded on contract * * *

The action having been wrongly constituted, it might well be dismissed with costs on that ground. The appellant was entitled to come before the court only by way of originating notice under section 12. In *Bashall* v. *Bashall* (7), referred to in the 4th Ed. of *Lush on Husband and Wife,* at page 601, in which Collins J. held that a husband could not sue his wife in detinue, the action was dealt with as though it had been commenced under the corresponding section of the English legislation. I think that may be done in the present instance, but the fact that the appellant had no right of action by writ affects the question of costs.

On the merits the evidence, in my opinion, does not establish any title or interest in the respondent with respect to the real property but there is ample evidence to support the finding of the learned trial judge with respect to the chattels and the appeal as to the chattels should be dismissed with the variation that if the parties cannot agree as to their division there should be a reference to the Master.

(1) [1935] O.R. 329.
(2) [1937] O.W.N. 500.
(3) [1942] O.W.N. 500.
(4) [1905] 2 K.B. 539.
(5) [1930] 2 K.B. 378.
(6) [1948] 2 All E.R. 573.
(7) The Times, Nov. 21, 1894.

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Ordinarily where proceedings of this nature are initiated while the parties are still husband and wife, the court will not make an order for possession of the matrimonial home in favour of the husband so long as the relationship subsists unless other provision in substitution is made for the wife; *Hill* v. *Hill* (1), *D. and D., supra.* It has been held however, in *Hichens* v. *Hichens* (2), that the court may conclude a proceeding involving questions of title, which was commenced subsequent to the decree *nisi,* notwithstanding the decree absolute and that in such a proceeding the fact of the decree absolute may be taken into consideration.

Appeal allowed. The respondent is entitled to one half of her costs in the Court of Appeal and in this Court, but no further order as to costs is made.

Solicitors for the appellant: *Herrington & Slater.*

Solicitor for the respondent: *A. W. S. Grier.*

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(1) [1916] W.N. 59.

(2) [1945] 1 All E.R. 451.